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No. 01-

IN THE

Supreme Court of the United States

CHARLES L. GRIMES AND GORDON W. CHAPLIN, TRUSTEES UNDER THE WILL OF LOUISE C. CHAPLIN; CHARLES L. GRIMES AND GORDON W. CHAPLIN, TRUSTEES UNDER THE LOUISE D. CATHERWOOD TRUST; AND GORDON W. CHAPLIN, INDIVIDUAL TRUSTEE OF THE JESSICA D. CATHERWOOD TRUST,

Petitioners,

v.

NAVIGANT CONSULTING, INC.; POLICEMEN AND FIREMEN RETIREMENT SYSTEM OF THE CITY OF DETROIT; *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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February 15, 2002

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QUESTIONS PRESENTED

1. Can class members who are not named parties to a class action appeal the district court's rejection of their objections to a settlement, properly presented in response to notice required by Rule 23 of the Federal Rules of Civil Procedure, without going through an intervention proceeding to redesignate them as named parties?

(*This question is presently before the Court in the granted case of* Devlin *v.* Scardelletti, *No. 01-417, oral argument scheduled for March 26, 2002.)*

2. If such class members are required to intervene and be redesignated as named parties in order to appeal, should the requirement be any more onerous than a *pro forma* post-judgment intervention pursuant to an unconditional right to intervene?

PARTIES TO THE PROCEEDING

Respondents in this Court are the defendants in the consolidated proceedings below who participated in proceedings for approval of the settlement in the District Court or in the appeal below (Navigant Consulting, Inc., Charles A. Demirjian, Stephen J. Denari, and Robert P. Maher), and the plaintiffs in the consolidated proceedings below (represented by Policemen and Firemen Retirement System of the City of Detroit, appointed Lead Plaintiff).

The case below was a consolidation of 22 separate actions all filed in the United States District Court for the Northern District of Illinois. Listed in order of case number in the district court, they were:

Stearns v. Navigant Consulting, Inc., et al., Case No. 99-CV-7617

Friedman v. Navigant Consulting, Inc., et al., Case No. 99-CV-7633

Levitin v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7664

Bell v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7668

Greb v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7669

Piven v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7674

Ladig v. Navigant Consulting, Inc., et al., Case No. 99-CV-7684

Applebaum v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7686

Crown Holdings Corp. v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7754

Mulvihill v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7836

Morrison v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7868

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Abdullah v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7970

Mirsky v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-7984

Klar v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-8020

Martin v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-8162

Pasternak v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-8187

McGuire v. *Navigant Consulting, Inc., et al.*, Case No. 99-CV-8207

Cleenput v. *Navigant Consulting, Inc., et al.*, Case No. 00-CV-126

Neumann v. *Navigant Consulting, Inc., et al.*, Case No. 00-CV-379

Amin, et al. v. *Navigant Consulting, Inc., et al.*, Case No. 00-CV-448

Messemer v. *Navigant Consulting, Inc., et al.*, Case No. 00-CV-7235

In addition, Charles L. Grimes individually filed a similar action against Navigant Consulting, Inc., on behalf of himself and all others similarly situated, that was not consolidated with the cases below.

Named as plaintiffs in the various consolidated cases were:

Shaheen Mandil Abdullah, on behalf of himself and all others similarly situated

Joseph Amin

Milton and Roslyn Applebaum, on behalf of themselves and all others similarly situated

Arthur L. Bell and Meredith M. Bell, on behalf of themselves and all others similarly situated

Joseph Boodaie and Mojgan Boodaie

Jack Cleenput, on behalf of himself and all others similarly situated

Crown Holdings Corp., on behalf of itself and all others similarly situated

Stephen Friedman, on behalf of himself and all others similarly situated

Mitchell Greb, on behalf of himself and all others similarly situated

Ed Klar, on behalf of himself and all others similarly situated

Don Ladig, on behalf of himself and all others similarly situated

Raizy Levitin, on behalf of herself and all others similarly situated

Emery A. Martin, on behalf of himself and all others similarly situated

Frank McGuire, on behalf of himself and all others similarly situated

Glenn M. Messemer, on behalf of himself and all others similarly situated

Irving Mirsky, on behalf of himself and all others similarly situated

Todd Morrison, on behalf of himself and all others similarly situated

John Mulvihill, on behalf of himself and all others similarly situated

Erwin Neumann, on behalf of himself and all others similarly situated

Alvin Pasternak, on behalf of himself and all others similarly situated

Katherine K. Piven, on behalf of herself and all others similarly situated

Malcolm Rosenwald FBO Malcolm Rosenwald IRA, individually and on behalf of all others similarly situated

Peter C. Stearns, on behalf of himself and all others similarly situated

Named as defendants in one or more cases were:

Navigant Consulting, Inc.

Barry S. Cain

Charles A. Demirjian

Stephen J. Denari

Timothy D. Kingsbury

Robert P. Maher

A third-party plaintiff in one or more cases was:

Navigant Consulting, Inc.

A third-party defendant in one or more cases was:

Federal Insurance Company

An intervenor in one or more cases was:

Genesis Insurance Co.

Objectors to the settlement of the consolidated action were:

Stephen J. Denari

Charles A. Demirjian

Robert P. Maher

Charles L. Grimes and Gordon W. Chaplin, Trustees Under the Will of Louise C. Chaplin

Charles L. Grimes and Gordon W. Chaplin, Trustees Under the Louise D. Catherwood Trust

Gordon W. Chaplin, Individual Trustee of the Jessica D. Catherwood Trust

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PETITION FOR CERTIORARI

Charles L. Grimes *et al.* respectfully petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

I. PRELIMINARY

A. Reports of Opinions and Orders in the Case

The relevant decisions and orders of the court of first instance, the United States District Court for the Northern District of Illinois, are an unreported oral opinion denying petitioners' motion to intervene, App. 13a, and the associated minute order. App. 16a. The opinion of the Seventh Circuit on appeal is reported at 275 F.3d 616 (7th Cir. 2001), and is reprinted at App. 1a. The associated order of the Seventh Circuit, review of which is sought, is reprinted at App. 8a.

B. Basis for Jurisdiction in This Court

The judgment sought to be reviewed was entered on December 26, 2001. App. 8a. This Court has jurisdiction to review it on a writ of certiorari under 28 U.S.C § 1254(1).

C. Statutes and Rules of Court Involved in the Case

Statutes and rules of court of particular significance to this case are FED. R. APP. P. ("FRAP") 3; FED. R. CIV. P. 23(e) and 24; and portions of the Private Securities Litigation Reform Act of 1995 ("PSLRA") dealing with class notice, 15 U.S.C. § 78u-4(a)(7). They are reprinted in Appendix H, beginning at App.17a.

II. STATEMENT OF THE CASE

A. Jurisdiction in the Court of First Instance

The court of first instance, the United States District Court for the Northern District of Illinois, had jurisdiction under 28 U.S.C. § 1331, in that the actions arose under §§ 10(b), 20(a), and 27 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78(a), 78(b), and 78aa.

B. Events Before the Opinion Below

1. Petitioners are shareholders in respondent Navigant Consulting, Inc., a Delaware corporation with headquarters in Chicago. They purchased stock in Navigant both during and after the "Class Period" discussed *infra*. Beginning in November 1999, a number of substantially identical class action complaints — totaling 22 in all[1] — alleging violations of the federal securities laws were filed against Navigant and other defendants in the Northern District of Illinois. These actions were subsequently consolidated.

The gravamen of the consolidated action was the charge that Navigant had misstated its financial results for the first three quarters of 1999, thereby artificially inflating the market prices of its common stock and call options and thus causing damage to Navigant shareholders. This was allegedly accomplished by the use of an accounting method called the pooling of interest method, as opposed to one called the purchase method, with respect to certain

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[1] The opinion below says there were 21 consolidated actions, App. 3a, but this is erroneous.

acquisitions of other companies during the first quarter of 1999. The technical specifics of these methods are not material for present purposes; suffice it to say that the pooling of interest method produces[2] significantly higher apparent revenue and income than does the purchase method, and that its use was improper if certain transactions took place within six months of the relevant acquisitions. Such a transaction — compounded by a press release falsely describing it — did take place in July 1999, well within the six-month period.

Nevertheless, during the first three quarters of 1999 Navigant issued press releases and filed documents with the SEC reporting its financial results using the pooling of interest method. Not until November 22, 1999, after filing a third-quarter 10-Q with the SEC that continued to use the pooling of interests method, did Navigant issue a press release stating that its accounting method "*may* have been *inappropriate*" (emphasis added); not until January 24, 2000, did Navigant issue a press release disclosing that its Board had instructed management to restate financial statements to account correctly for the relevant acquisitions — thereby reducing Navigant's previously reported income by 36%.

2. In addition to the consolidated actions, petitioner Grimes in his individual capacity, on behalf of himself and all others similarly situated, filed in September of 2000 an action against Navigant in the United States District Court for the District of

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[2] Or produced; it has been abolished by the Financial Standards Accounting Board for transactions after mid-2001. App. 3a–4a.

Delaware. This was transferred to the Northern District of Illinois, but was not consolidated with the other 22 actions and was assigned to a different judge of that court.[3]

3. After consolidation of the 22 actions, pursuant to the PSLRA the district court appointed as lead plaintiff respondent Policemen and Firemen Retirement System of the City of Detroit (a shareholder that had not itself filed an action and all of whose purchases of Navigant stock had been made between May 6 and November 19, 1999, well within the class period as ultimately defined in the settlement agreement); together with two law firms as lead counsel, one of which was nearly disqualified for professional improprieties in its efforts to get appointed to that position. *Stearns* v. *Navigant Consulting, Inc.*, 89 F. Supp. 2d 1014 (N.D. Ill. 2000).

On December 1, 2000, a settlement notice pursuant to FED R. CIV. P. 23(e) was sent out to class members, advising that the Navigant defendants and this appointed lead plaintiff had entered into a settlement deal on September 22. Among other things, the settlement provided for damages only with respect to stock purchased during a Class Period defined as January 1, 1999, to November 19, 1999 (the last business day before the press release that said the company's accounting method "*may* have been *inappropriate*" (emphasis added)); the class being defined as persons who had purchased stock during

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[3] The opinion below says that Grimes "sought to have this twenty-second suit consolidated with those already under way. The district court denied this motion." App. 5a. This is erroneous. Grimes did not seek consolidation and he filed no such motion.

that Class Period. Any class member wishing to share in the settlement was required to release all claims with respect to any statement, misrepresentation, or omission made during the Class Period – which covered all the relevant statements, misrepresentations, and omissions.

The settlement thus took care of the lead plaintiff, but afforded no relief to other class members such as petitioners with respect to stock purchases made after November 19, 1999, but before January 24, 2000, the date of the crucial announcement confirming that the accounting method had in truth been wrongful and directing restatement of financial statements. Moreover, representations by lead counsel as to the company's financial situation made it plain that a stockholder opting out of the settlement had little prospect of any recovery at all.

4. The petitioners duly and timely filed objections to the settlement pursuant to the notice, contending (a) that excluding purchases of stock during the November-January period unfairly rewarded class members such as the lead plaintiff at the expense of others such as petitioners, and (b) that the notice failed to comply with the PSLRA, in that the fees sought by lead counsel were greater than the amount set forth in the notice. The district court rejected these objections without written opinion, and on March 22, 2001, entered orders approving the settlement as fair, reasonable, and adequate, and awarding the full amount of fees sought by lead counsel.

5. On April 12, petitioners filed a notice of appeal of these orders of March 22 to the court below. On April 24 the court below issued an order that noted (a)

that the March 22 orders did not appear to be final appealable judgments because a third-party complaint filed by Navigant against an insurer was still pending, and (b) that petitioners appeared not to have standing to appeal, since they had not intervened as named parties in the district court action. The order directed petitioners either to file a brief setting forth the reasons why the appeal should not be dismissed for lack of jurisdiction, or to move for voluntary dismissal of the appeal. App. 10a.

The first ground of objection was cured by an order of May 3 in the district court, certifying the March 22 orders as final judgments pursuant to FED. R. CIV. P. 54(b). App. 11a. As to the second objection, counsel had been unaware that the Seventh Circuit, unlike their home circuit the Third, does not allow unsuccessful objectors to appeal unless they have first intervened and become named parties in the district court. *Compare Felzen* v. *Andreas*, 134 F.3d 873 (7th Cir. 1998), *aff'd by an equally divided court sub nom. California Public Employees' Retirement System* v. *Felzen*, 525 U.S. 315 (1999) (intervention required), *with Carlough* v. *AmChem Products, Inc.*, 5 F.3d 707, 710 (3d Cir. 1993) (intervention unnecessary). They accordingly moved on May 4 for voluntary dismissal of their initial appeal (dismissal order entered May 8, App. 12a), and returned to the district court that same day with a motion to intervene solely in order to appeal. That motion was denied on May 9, App. 13a, with an oral opinion (*sub nom. Stearns* v. *Navigant Consulting, Inc.)* that it was untimely because "if you are planning to appeal any ruling, and you never know how the rulings are going to go, you need to intervene at the earliest opportunity in order to take an appeal

at some point," and on the ground that delay in, and complication of, settlement distribution constituted prejudice to Navigant and the class members. (The opinion did not consider any countervailing prejudice to petitioners.) App. 13a–14a.

6. Petitioners, by a notice of appeal filed on May 22, then appealed to the court below the district court denial of their motion to intervene, together with a conditional appeal of the orders of March 22, now certified as final judgments. On December 26, 2001, the court below affirmed denial of the motion to intervene, and dismissed for want of jurisdiction the conditional appeal from the orders approving the settlement, with an opinion by Judge Easterbrook. App. 7a.

C. The Opinion Below

The court first emphasized that it adhered to its view, enunciated in *Felzen*, *supra*, that because of references to "parties" in FRAP 3, and this Court's decision in *Marino* v. *Ortiz*, 484 U.S. 301 (1988) (per curiam) (non-class-member non-parties could not appeal a judgment in a class action), "[o]nly parties may appeal from judgments entered in federal litigation," and "[b]ecause members of a class (other than the named representatives) are not automatically parties, they must intervene and acquire party status if they wish to appeal." App. 1a–2a. Petitioners had suggested that the court overrule *Felzen*, but "[t]hat decision," said the court, "is not a candidate for reconsideration. . . . The ball is in another Court" — *viz.*, this Court, in *Devlin* v. *Scardelletti*, No. 01-417. "That is the right forum for further debate." App. 5a.

"Still," said Judge Easterbrook, "we cannot resist a few comments"; and the opinion went on to make it clear that the Seventh Circuit, unlike other circuits, based its reasoning not on "policymaking by judges" concerning "sound practice," nor on notions of "whether class members have 'standing' to appeal," but on the "more formal position" that "[a]ppellate Rule 3 limits appeals to parties, and . . . [c]lass members (other than the representatives) are not parties . . . ." App. 5a–6a

Intervention, said the opinion, reduces uncertainty and facilitates discovery, and accordingly "we insist that timely requests to intervene be freely granted." App. 7a. But the opinion made it clear that by "timely" it meant that "delay must be measured from the time the would-be intervenors learned (or should have known) of the representative's shortcomings," quoting from *Crawford* v. *Equifax Payment Services, Inc.*, 201 F.3d 877, 880 (7th Cir. 2000) (internal quotes omitted); that "[e]verything depends on the gap between the need for action and the taking of action." App. 2a.

In the instant case, it said, petitioners "probably should have intervened before the settlement was negotiated," App. 3a, *viz.*, back in August 2000, when, said the opinion, they "knew that the damages period proposed by the class representatives would close in November 1999, omitting some of their trades." App. 4a. Accordingly, "the district judge acted within his discretion in finding" that the motion for intervention was too late. App. 5a. The order denying the motion to intervene was therefore affirmed, and the conditional appeal from the orders approving the

settlement and awarding fees was dismissed for want of jurisdiction. App. 8a.

III. REASONS FOR ALLOWANCE OF THE WRIT

A. The Petition Should Be Granted as to the First Question Presented Because It Raises the Identical Issue as to Which This Court Has Already Granted a Petition for Certiorari in *Devlin* v. *Scardelletti*, No. 01-417.

The first question presented is one on which the circuits are irreconcilably split, and is the same question (phrased slightly differently) as is presented in *Devlin* v. *Scardelletti*, No. 01-417, in which a petition for certiorari was granted on December 10, 2001. Petitioners respectfully suggest that this in itself is fully sufficient reason for allowance of the writ in this case.

Petitioners also respectfully refer the Court to the brief filed by these petitioners as *amici curiae* in *Devlin*.

B. The Petition Should Be Granted as to the Second Question Presented, Because If This Court Decides That Intervention Is Necessary in Order To Appeal, the Lower Courts Should Have Clear Guidance as to the Applicable Requirements.

(We have stated this as a separate question out of an abundance of caution, although we believe it to be "fairly included," Rule 14.1(a), in the first question.)

If nevertheless the Court should conclude that intervention is necessary in order for a class member

to appeal rejection of objections to a settlement, the lower courts will need guidance in applying such a rule. The approach taken by the court below cannot be squared either with the clearly enunciated policy of Congress or with this Court's holding in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977).

1. Even If Intervention Is Deemed Necessary, No More Should Be Required Than a *Pro Forma* Post-Judgment Intervention As of Unconditional Right With Minimum Paperwork.

The potential for corruption in class action settlements (and the related field of derivative action settlements) has long been recognized. Once the settlement deal is cut, there are no longer adversaries before the court; the named parties have every incentive to defend the deal and none whatever to question it. (And realism compels recognition that the court itself will often be predisposed to see a case disposed of by settlement.) "Once a settlement is agreed, the attorneys for the plaintiff shareholders link arms with their former adversaries to defend their joint handiwork. . . . All the dynamics conduce to judicial approval of such settlements." *Alleghany Corp.* v. *Kirby*, 333 F.2d 327, 347 (2d Cir. 1964), *aff'd en banc by an equally divided court*, 340 F.2d 311 (2d Cir. 1965), *cert. dismissed*, 384 U.S. 28 (1966) (Friendly, J., dissenting.) "In assessing settlements of representative actions, judges no longer have the full benefit of the adversarial process. . . . In seeking court approval of their settlement proposal, plaintiffs' attorneys and defendants' interests coalesce and mutual interest may result in mutual indulgence. The

parties can be expected to spotlight the proposal's strengths and slight its defects." *Bell Atlantic Corp.* v. *Bolger*, 2 F.3d 1304, 1310 (3d Cir. 1993) (citations omitted).

For this reason, FED R. CIV. P. 23(e) requires that unnamed class members be given notice of any proposed settlement so they can have a fair opportunity to object. "In such circumstances, objectors play an important role by giving courts access to information on a settlement's merits." *Ibid.*

By the beginning of the 1990s, class action settlements had become a scandal. "Much like the production of sausage and legislation," Professor John C. Coffee, Jr., of Columbia Law School wrote in 1991, "the settlement of securities litigation is a process that the high-minded are best advised not to examine too closely." Coffee, *Suspect Settlements in Securities Litigation*, New York Law Journal, March 28, 1991, at 5 col. 1. Professional journals,[4] the general press,[5] and

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[4] *E.g.*, Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 714-20 (1986); Coffee, *The Unfaithful Champion: The Plaintiff As Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5, 26-33 (Summer 1985); Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 232-33, 239-46 (1983).

[5] *E.g.*, Lambert, *Public Interest Law Group Fights Some Class Settlements as Unfair*, WALL ST. JOURNAL, August 17, 1995, at B4; Coffee, *The Corruption of the Class Action*, WALL ST. JOURNAL, Sept. 7, 1994, at A15; *Millions for Us, Pennies for You*, NEW YORK TIMES, December 19, 1993, Section 3, at 1; *Coupon Clipping for Lawyers*, WALL STREET JOURNAL, November 18, 1993, at A20 col. 1; Baron, *An Asbestos Settlement With a Hidden*

the Chairman of the SEC,[6] all weighed in with their concern. ("[W]e have a hard time believing the lawyers deserve their money for producing a settlement in which all the real money goes to the lawyers," said the *Wall Street Journal*. "Funny, we thought the justice system was supposed to have something to do with, well, justice." *Coupon Clipping for Lawyers, supra* n.5.)[7]

Congress took note of the scandal, and after several years of hearings and investigations it enacted the PSLRA for class actions under the securities laws.

Agenda, WALL ST. JOURNAL, May 6, 1993, at A11, col. 3; Moses, *Off to Court: Lawyer Given To Filing Shareholder Lawsuits Comes Under Scrutiny*, WALL ST. JOURNAL, October 28, 1992, at 1, col. 8; Burton, *The Litigator: How Stanley Chesley Settles Things Quickly in Mass-Injury Suits: Class-Action Attorney Earns Big Fees in Settlements Some Say Are Premature*, WALL ST. JOURNAL, June 26, 1992, at 1, col. 1.

[6] "[V]irtually all securities class actions are settled for some fraction of the claimed damages, and some allege that settlements often fail to reflect the underlying merits of the cases." Remarks by Chairman, Arthur Leavitt ... Securities Regulation Institute, U. of Calif. San Diego, January 26, 1994, at 3, 6.

[7] Public concern over class action abuses continues to this day. See *Lerach's Enron Gambit*, WALL ST. JOURNAL, February 6, 2002, at 18 col. 1 ("'I have the greatest practice of law in the world,' Mr. Lerach once quipped to a group of corporate directors. 'I have no clients.'"); *Milberg Weiss Faces Inquiry, Report Says*, NEW YORK TIMES, January 26, 2002, at C3 col. 8 (reporting a federal grand jury investigation into whether a leading class-action law firm paid plaintiffs to take part in investor suits); *In a Class of His Own: How Melvyn Weiss, a Class Action Lawyer, Finds Crimes That Pay*, THE ECONOMIST, January 19, 2002, at 56 ("a lawyer could now seek out an injustice and then troll for clients who could give him access to the court — plus a big slice of any settlement").

Pub. L. 104-67, 109 STAT. 737, 15 U.S.C. § 77u. Among other provisions, the PSLRA seeks to eliminate "professional lead plaintiffs" (and their professional lead lawyers and the attendant races to the courthouse) by providing for a court-selected lead plaintiff who in turn chooses lead counsel; cuts down on "fishing expedition" lawsuits; and, most significantly for the instant issue, requires extensive detail in settlement notices, including a statement of the recovery agreed on, a statement of the potential recovery, a statement and explanation of attorneys' fees to be sought, and a statement of the reasons for proposing the settlement. 15 U.S.C. § 77u-1(a)(7).

The reason for this last provision is obvious: to make it easier for class members to evaluate the proposed settlement so as to enable them to object if they feel they should do so. Thus, the conference committee quoted the testimony of a class member in two separate securities fraud lawsuits: "I feel that the settlement offer should have told the stockholders how little of their losses will be recovered in the settlement, and that this is a material fact to the shareholder's *decision to approve or disapprove the settlement*." H.R. Conf. Rep. No. 104-369, 104th Cong., 1st Sess. at 36 (1995) (emphasis added).

In other words, the PSLRA reconfirms, through provisions that transcend the merely procedural and in effect impose substantive limits, that it is the public policy of the United States to facilitate a searching examination of class action settlements; to impose what Judge Friendly in *Alleghany*, *supra*, called "a high standard with respect to disclosure at settlement hearings," subjecting arguments in favor of the

settlement "to a most icy scrutiny." 333 F.2d at 347. And though the PSLRA itself deals only with securities cases, identical policy considerations apply to all class actions. See the proposed revisions to Rule 23(e) to strengthen the settlement review and approval process, with extensive discussion, in Report of the Civil Rules Advisory Committee, May 14, 2001, as revised July 31, 2001, http://www.uscourts.gov/rules/comment2002/8-01CV.pdf, at 51-69.

Scrutiny at least as icy should be accorded to erection of obstacles, unrelated to the merits, to efforts by class members — whose rights, after all, will be determined and possibly cut off forever — to bring before the courts, both trial and appellate, perceived ways in which the settlement is not fair, reasonable, and adequate.

Foremost among these obstacles would be requiring formal intervention under FED. R. CIV. P. 24. It is expensive. It is burdened by elaborate paperwork, including the drafting of a separate complaint and the preparation of motions and briefs. It is hedged about with technicalities, such as having to litigate under Rule 24 such issues as timeliness and the adequacy of existing representation (an issue which has presumably already been addressed at the class certification stage, and presumably determined in the representative's favor), and opening up automatic disclosure under FED. R. CIV. P. 26(a). The only significant countervailing benefit posited by the opinion below is the ability to take discovery; but the participants already have that right in a properly managed fairness hearing. See 2 NEWBERG AND

CONTE, NEWBERG ON CLASS ACTIONS § 11.57 (3d ed. 1992).

As noted *infra*, the approach taken in the opinion below would often force class members to go through this process long before they even know whether they will wish to object. None of it has any relation to the merits of the settlement — which is all the objecting class member has any interest in.

And that is all the appellate courts should be interested in. Their role in examining class action settlements is vital. "Because a district court may overlook a 'mutual indulgence' [quoted from *Bell Atlantic Corp.* v. *Bolger*, *supra*], appellate review advances the policy of assuring the fairness to shareholders that underlies the requirement of court approval." *Kaplan* v. *Rand*, 192 F.3d 60, 67 (2d Cir. 1999) (derivative suit). "Th[e] unique relationship among plaintiffs' counsel, plaintiffs, and defendants in class actions imposes a special responsibility upon appellate courts to hear challenges to fee awards by class members whose claims may have been reduced or in some way affected in exchange for large fee awards." *In re Cendant Corporation PRIDES Litigation*, 243 F.3d 722, 728 (3d Cir. 2001).

Requiring objectors to intervene in order to appeal will not cut down on the number of appeals; it will just mean that courts of appeal will be faced with appeals from denials of intervention in addition to appeals from denials of objections. The primary issue will then be whether it was an abuse of discretion to deny intervention, not whether the settlement was fair, reasonable, and adequate to the class as a whole. As a Justice pointed out at oral argument in *Felzen*, there

would then be "no sure right of review other than on the abuse of discretion standard." Transcript of Oral Argument in *California Public Employees' Retirement System* v. *Felzen*, No. 97-1732, at 52. In the real world, as a Justice pointed out at oral argument in *Felzen*, district judges are going to look at the objections. If they do not like them, they are likely to deny intervention. *Id.* at 42. But the key question of fairness of the settlement will then be reviewed by the court of appeals only after having to deal with "14 other issues that could be crafted out of Rule 24." *Id.* at 44. Appellate courts should not allow trial courts to be their gatekeepers in this fashion.

The instant case affords a good example. In their objections, petitioners pointed out a square violation of the PSLRA's requirement that the settlement notice specify the amount of fees and costs class counsel would seek. 15 U.S.C. § 78u-4(a)(7). The district court's disregard of this plain requirement cried out for appellate correction; that is what a circuit court's job description is all about. (And awareness of this is a powerful incentive for district courts to be careful.) Instead, the court below entered into a lengthy dissertation on the principles of "timeliness" under Rule 24.

Consistent with clear policy, if intervention in order for objectors to appeal is required at all, it should be available as a matter of absolute right with a minimum of paperwork. And it should be deemed timely if sought within the 30 days after final judgment allowed for appeal. This last point has already been decided by this Court, in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977).

2. The Decision of the Court Below as to This Issue Conflicts With This Court's Decision in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977).

The court below gave lip-service to the policy of close scrutiny of class action settlements, saying that "it is vital that district courts use [intervention by objectors] to promote vindication of the class members' rights; that's why we insist that timely requests to intervene be freely granted." App. 7a. But what it seemed to give with one hand it took away with the other, by an extreme interpretation of what is "timely." To be "timely," it in effect held, a class member must move to intervene at the earliest moment he may suspect (or at the earliest moment a court may after the fact think he should have suspected) that a potential settlement will not be to his liking — even though the offending provision might never be included in the settlement, and even though the settlement itself might never be reached after all. App. 3a. This is simply contrary to *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), in which this Court recognized the wastefulness of forcing premature intervention by a potential appellant, and held that a motion to intervene in order to appeal is timely if brought within the 30-day period for filing a notice of appeal under FRAP 4(a).

In *United Airlines*, the district court declined to certify a class in a case brought as a class action. Such an order was not immediately appealable as of right in the relevant circuit (the Seventh). After an unsuccessful effort at interlocutory appeal under 28 U.S.C. § 1292(b), the named plaintiffs continued their

action on an individual basis. In due course they prevailed on the merits and the defendant agreed to pay determined amounts of back pay; and, three years after the denial of class certification, a final judgment was entered in the case. Within the 30-day deadline for appealing under FRAP 4(a), McDonald, an unnamed class member, moved to intervene to appeal the denial of class certification.[8]

This Court held that McDonald's motion to intervene should have been granted, because it was filed within the 30-day period for appealing the final judgment — as against the contention that she should have moved to intervene promptly after the class certification denial three years before. It rejected the argument — which is the approach adopted in the instant case by the court below — that intervention should be required at the earliest date when the intervenor might have sensed some potential deficiency in a possible settlement: for such a rule, it pointed out, could make the intervenor "a superfluous spectator in the litigation" until such time as a final appealable order is entered, and "would induce putative class members to file protective motions to intervene .... The result would be the very multiplicity of activity which Rule 23 was designed to avoid." 432 U.S at 394 n.15 (citations and internal quotes omitted). Rather, it said, "[t]he critical fact here is that *once the entry of final judgment made the adverse class determination appealable*, the respondent quickly sought to enter the litigation." 432 U.S. at 394 (emphasis added).

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[8] The issue of whether intervention was necessary in order to appeal was not raised in the case.

> "The critical inquiry in every such case is whether in view of all the circumstances the intervenor acted *promptly after the entry of final judgment*. *Cf. NAACP* v. *New York*, 413 U.S. 345, 366. Here, the respondent filed her motion *within the time period within which the named plaintiffs could have taken an appeal*. We therefore conclude that the Court of Appeals was correct in ruling that the respondent's motion to intervene was timely filed and should have been granted."

432 U.S. at 395-96 (emphasis added).

United Airlines was misinterpreted by the court below. Evidently fixated upon the idea that intervention must take place as early as possible, it dismissed *United Airlines* as "hold[ing] that class members are entitled to intervene even after judgment, in order to pursue an appeal, *if they do not learn until after judgment of the circumstance ... that calls for intervention*." App. 2a (emphasis added). With respect, this is plain wrong. It is true that in *United Airlines* this Court did note, in passing, that since the named plaintiffs had tried to take an interlocutory appeal of the denial of class certification, there had been no reason for McDonald to suppose they would not appeal after final judgment, and that she moved as soon as she learned to the contrary. 432 U.S. at 393-94. But these comments clearly formed no part of the rationale of the opinion; which, as noted *supra*, was based entirely on the fact that the motion was filed before the 30-day period of FRAP 3 had run against the appealable judgment. Rather, these comments were made in the context of whether the

defendant had been prejudiced by the delay and whether early intervention would have been unnecessarily cumbersome. 432 U.S. at 393 n.14, 394 n.15.[9]

The dissent in *United Airlines* drives home the teaching of that case and underscores the mistaken

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[9] We note that the last sentence of the reporter's syllabus in *United Airlines* is misleading: "Thus as soon as it became clear that the interests of the unnamed class members would no longer be protected by the named class representatives, and within the applicable appeal period, respondent moved to protect those interests." 432 U.S. at 386. A quick reading of this language, without study of the opinion itself, could seem to put at least as much emphasis on the time the appellant was aware that the named plaintiffs would not appeal as on the deadline for filing a notice of appeal. But "the headnote is not the work of the court, nor does it state its decision ... It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession in the examination of the reports. ... And finally, the headnote is a misinterpretation of the scope of the decision." *United States* v. *Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906).

Perhaps the analysis of the court below in the instant case was influenced by its own opinion in *United Airlines*. That opinion was based entirely on the concept that timeliness was measured from the time McDonald learned that the named plaintiffs would not appeal. *Romasanta* v. *United Airlines, Inc.*, 537 F.2d 915 (7th Cir. 1976). It referred to the 30-day appeal deadline only in passing, to point out that it had jurisdiction to consider not only the appeal from the refusal to permit intervention but also the appeal from the order refusing to certify the class. *Id.* at 919. Note that in affirming the judgment below in *United Airlines*, this Court merely said that the Seventh Circuit "was correct in ruling that the respondent's motion to intervene was timely filed and should have been granted," 432 U.S. at 395-96; it refrained from endorsing the Seventh Circuit's *reasoning* in support of its ruling.

interpretation by the court below. Without challenge from the majority, it stated flatly that "the Court apparently has ruled that a motion to intervene for the purpose of appealing the denial of class status is *timely under Rule 24 as a matter of law, so long as it is filed within the time period in which the named plaintiffs could have taken an appeal.*" 432 U.S. at 398 (emphasis added). As for reliance by McDonald on the class representatives to bring an appeal, the dissent considered that to be a "critical fact" only in that in its view such reliance had been misplaced because her claim had been time-barred (on the theory that the statute of limitations began running against her and the other unnamed class members once class certification had been denied). 432 U.S. at 399.

In the instant case, petitioners "acted promptly after the entry of final judgment" and "within the time period in which the named plaintiffs could have taken an appeal." 432 U.S. at 395-96. The judgment became final and appealable on May 3. App.11a. A notice of appeal — and, under *United Airlines*, a motion to intervene — filed any time before June 2 would thus have been timely. Petitioners filed their motion to intervene on May 4. It was thus "timely filed and should have been granted" under *United Airlines*. The decision of the court below thus "conflicts with [that] relevant decision[ ] of this Court." Rule 10(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals for the Seventh Circuit in *In the Matter of: Navigant Consulting, Inc., Securities Litigation*, 275 F.3d 616 (7th Cir. 2001)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-2311

In the Matter of: Navigant Consulting, Inc., Securities Litigation

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Appeal of: Charles L. Grimes and Gordon W. Chaplin, as Trustees under the Will of Louise C. Chaplin, *et al.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 99 C 7617 — Ruben Castillo, Judge.

Argued December 6, 2001
Decided December 26, 2001

Before CUDAHY, EASTERBROOK, and EVANS, Circuit Judges.

[275 F.3d 617]

EASTERBROOK, Circuit Judge. Only parties may appeal from judgments entered in federal litigation. See FED. R. APP. P. 3; *Marino* v. *Ortiz*, 484 U.S. 301 (1988). Because members of a class (other **[275 F.3d**

618] than the named representatives) are not automatically parties, they must intervene and acquire party status if they wish to appeal. See *Felzen* v. *Andreas*, 134 F.3d 873 (7th Cir. 1998), affirmed by an equally divided Court under the name *California Public Employees' Retirement System* v. *Felzen*, 525 U.S. 315 (1999). In this case class members who objected to approval of the settlement in a class action ignored that rule and attempted to appeal without becoming parties. After receiving a notice from our staff that there appeared to be a jurisdictional problem, the objectors returned to the district court with a motion to intervene. That motion was denied as untimely, precipitating this appeal from the denial of the motion to intervene — with a conditional appeal from the order approving the settlement. See *In re Synthroid Marketing Litigation*, 264 F.3d 712, 715-16 (7th Cir. 2001).

Intervention is possible only on "timely application". FED. R. CIV. P. 24(a), (b). Like the district court, we find it hard to see how a post-judgment motion could be timely. "Hard" differs from "impossible"; *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), holds that class members are entitled to intervene even after judgment, in order to pursue an appeal, if they do not learn until after judgment of the circumstance (the representative's abandonment of the class) that calls for intervention. Everything depends on the gap between the need for action and the taking of action. Thus, we held in *Crawford* v. *Equifax Payment Services, Inc.*, 201 F.3d 877, 880 (7th Cir. 2000), that "delay must be measured from the time the would-be intervenors learned (or should have known) of the representative's shortcomings." *Crawford*

added, as did *Synthroid*, that intervention should be freely allowed, if limited to the purpose of taking an appeal. But this attitude cannot abolish the requirement in Rule 24 that intervention be timely.

The objectors' appellate brief in this case gives no reason for their delay in moving to intervene. Pressed at oral argument, counsel supplied one: His ignorance of *Felzen* and its predecessors. This may be the explanation but is not a justification. Many deadlines confront counsel, from the statute of limitations to the 30-day period for taking an appeal, and failure to inform oneself of the procedural requirements is no excuse for ignoring them. Although the district judge might have deemed the explanation sufficient, *cf. Pioneer Investment Services Co.* v. *Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), the judge was not required to do this, and deferential appellate review of this discretionary decision can have only one outcome.

Indeed, these objectors probably should have intervened before the settlement was negotiated. The class representatives in these 21 consolidated actions alleged that Navigant Consulting violated the federal securities laws by making false statements, injuring investors in aftermarket trading. Like other actions of this sort, identifying injured traders required specifying the date when the price first was affected by the deceit and the date when the truth reached the market and the price adjusted to that news. The asserted fraud in this case was the use of pooling to account for four of Navigant's acquisitions, although generally accepted accounting principles prohibited the use of that method under the circumstances. (Pooling

has since been abolished by the accounting profession for all transactions after June 29, 2001. See FINANCIAL ACCOUNTING STANDARDS BOARD, STATEMENTS 141 and 142.) Navigant first **[275 F.3d 619]** released earnings using pooling early in 1999, and before the opening of the markets on November 22 of that year it announced that its accountants had questioned this treatment, that earnings might have to be restated, and that its senior officers had resigned or been discharged. The price of Navigant's stock dropped 45% (from $26.00 to $14.25 per share) that day. The class representatives sought recovery for investors who bought stock during 1999 before this disclosure and the precipitous decline. The objectors believe, however, that purchasers through January 24, 2000, when Navigant released its restated earnings, should be included in the class — even though the market rose when the restated earnings were announced. (The announcement on November 22 did not reveal the extent of the loss, and traders may well have assumed that if there were any good news this would have been stated. See Sanford J. Grossman, *The Informational Role of Warranties and Private Disclosure About Product Quality*, 24 J. L. & ECON. 461 (1981); Paul Milgrom & John Roberts, *Relying on the Information of Interested Parties*, 17 RAND J. ECON. 18 (1986). Not until January 2000 was the loss quantified, and because the worst had not come to pass the price rose.)

By August 2000 the objectors knew that the damages period proposed by the class representatives would close in November 1999, omitting some of their trades. That was the time to seek intervention, but the objectors did not. Instead they filed another class

action in September 2000, naming themselves as representatives, and sought to have this twenty-second suit consolidated with those already under way. The district court denied this motion. Denied this self-help role, the objectors then could have sought intervention or opted out and relied on their own class suit. But they did neither, waiting until May 4, 2001, to get the intervention process started. The district judge acted within his discretion in finding that this was too late for persons who had known for at least eight months about the aspects of the representatives' position to which they objected.

Anticipating that we might reach this conclusion, the objectors ask us to overrule *Felzen* and permit appeals by class members that have not become formal parties. That decision is not a candidate for reconsideration. The circuits are in conflict and will be no matter what we do. The ball is in another Court, which has indicated an inclination to take a new look at the subject. See *Scardelletti* v. *Debarr*, 265 F.3d 195 (4th Cir.), *cert. granted under the name Devlin* v. *Scardelletti*, No. 01-417 (2001 U.S. Lexis 10959 Dec. 10, 2001). That is the right forum for further debate.

Still, we cannot resist a few comments. Although other circuits see the question as one for policymaking by judges — the divided opinion in *Scardelletti* is a good example, with both the majority and the separate opinion explaining why in their view sound practice calls for one or another outcome — this court in *Felzen* took a more formal position. Appellate Rule 3 limits appeals to parties, and in *Marino* the Supreme Court enforced that requirement. Class members (other than the representatives) are not parties; if they were, their

citizenship would count for purposes of the complete-diversity requirement in suits under 28 U.S.C. sec.1332, yet it is established that class members' citizenship is disregarded. See *Smith* v. *Sperling*, 354 U.S. 91 (1957). Class members cannot have it both ways, being non-parties (so that more cases can come to federal court) but still having a party's ability to litigate independently.

[275 F.3d 620] Although several decisions (again *Scardelletti* is a good example) discuss the problem as if the question were whether class members have "standing" to appeal, we do not think that this is apt. Class members suffer injury in fact if a faulty settlement is approved, and that injury may be redressed if the court of appeals reverses. What more is needed for standing? See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Our point in *Felzen* was that parties are a subset of persons with standing. It is not enough to suffer injury; one must become a litigant by taking the necessary formal steps (such as filing a timely complaint, or here filing a timely motion to intervene and then a timely notice of appeal).

Observance of form has benefits, such as a reduction in uncertainty and the costs that uncertainty breeds. Intervention identifies with precision who is entitled to take what procedural steps, and when. It also may facilitate accurate decision on the merits. Our case shows how. The objectors say that because of fraud the price of Navigant's stock remained too high in the period between November 22, 1999, and January 24, 2000, and that investors who bought during these months should be entitled to a portion of the recovery. Intervention would have allowed the

court to explore that question: the class representatives and Navigant could have taken discovery from the objectors to learn just what trades they made, how these may have been influenced by lack of information in the market, and so on. Intervention and extra discovery might have led the judge to obtain the views of an expert in financial economics. But by remaining on the sidelines until after final decision in the district court, these objectors hobbled that inquiry and made the appeal a needlessly speculative venture.

By insisting on party status of appellants, then, we facilitate adjudication in district courts too. As we stressed in *Crawford* and *Synthroid*, it is vital that district courts use this formal rule to promote vindication of the class members' rights; that's why we insist that timely requests to intervene be freely granted. But these objectors tarried when their own deeds (especially their separate lawsuit) demonstrate that they understood the need for action.

The order denying the motion to intervene is affirmed, and the conditional appeal from the order approving the settlement is dismissed for want of jurisdiction.

APPENDIX B

Order of the Court of Appeals for the Seventh Circuit affirming denial of motion to intervene and dismissing conditional appeal in *In the Matter of: Navigant Consulting, Inc., Securities Litigation*, No. 01-2311 (7th Cir. December 26, 2001) (order)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

BEFORE: Honorable RICHARD D. CUDAHY, Circuit Judge
Honorable FRANK H. EASTERBROOK, Circuit Judge
Honorable TERENCE T. EVANS, Circuit Judge

No. 01-2311

APPEAL OF: CHARLES L. GRIMES and GORDON W. CHAPLIN, Objectors

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 99 C 7617, Ruben Castillo, Judge

The order denying the motion to intervene is affirmed, with costs, and the conditional appeal from the order approving the settlement is dismissed for want of jurisdiction. The above is in accordance with the decision of this court entered on this date.

APPENDIX C

Order of the Court of Appeals for the Seventh Circuit with respect to initial appeal in *In the Matter of: Navigant Consulting, Inc., Securities Litigation*, No. 01-1896 (7th Cir. April 24, 2001)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 24, 2001

By the Court:

IN RE: NAVIGANT CONSULTING, INCORPORATED, SECURITIES LITIGATION

APPEAL OF: CHARLES W. GRIMES AND GORDON CHAPLIN

No. 01-1896

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 99 C 7617

Ruben Castillo, Judge

ORDER

A preliminary review of the short record indicates that the order appealed from may not be a final appealable judgment within the meaning of 28 U.S.C. § 1291.

Charles Grimes and Gordon Chaplin take an appeal from the final judgment in this case. Grimes and Chaplin, however, are not named plaintiffs and have not intervened in the case. Therefore, it does not appear that they have standing to appeal. See *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *aff'd. by an equally divided court sub nom. California Public Employees' Retirement System v. Felzen*, 525 U.S. 315 (1999).

Further, defendant Navigant Consulting filed a third-party complaint, but it does not appear that the district court entered an explicit order disposing of the third-party complaint. Any such appeal, therefore, would appear premature. Accordingly,

IT IS ORDERED that appellants shall file, on or before May 8, 2001, a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. Briefing shall be suspended pending further court order.

NOTE: Caption document "JURISDICTIONAL MEMORANDUM." The filing of a Circuit Rule 3(c) Docketing Statement does not satisfy your obligation under this order.

APPENDIX D

Excerpt From Minute Order of the United States District Court for the Northern District of Illinois in *In the Matter of: Navigant Consulting, Inc, Securities Litigation*, Case No. 99 C 7617 (N.D. Ill. May 3, 2001)

(N.B.: The original is a printed form containing boxes to be filled in and checked; not suitable for full transcription; all relevant material is here included.)

Name of Assigned Judge or Magistrate Judge:
Ruben Castillo

Case Number: 99 C 7617

Date: 5/3/2001

Case Title:
In Re: Navigant Consulting, Inc. Securities Litigation

Enter Order. Parties' joint motion to certify final judgment pursuant to Fed. R. Civ. P. 54(b) is granted. The Order and Final Judgment and the Order Awarding Attorneys Fees and Reimbursement of Expenses to Counsel for the Class are amended as follows: This Court determines that the claims in the pending third party action are separate and distinct from the claims resolved in this Order and there is no just reason for delaying entry of this Order as a final judgment. Therefore, this Court directs that this Order be entered as a final judgment pursuant to Fed. R. Civ. P. 54(b).

Date docketed. May 7 2001

APPENDIX E

Order of the Court of Appeals for the Seventh Circuit granting voluntary dismissal of initial appeal in *In the Matter of: Navigant Consulting, Inc., Securities Litigation*, No. 01-1896 (7th Cir. May 8, 2001)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

DISMISSAL PER FRAP 42(b)

Date: May 8, 2001

By the Court:

No. 01-1896

IN RE: NAVIGANT CONSULTING, INCORPORATED, SECURITIES LITIGATION

APPEAL OF: CHARLES L. GRIMES and GORDON W. CHAPLIN

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 99 C 7617, Ruben Castillo, Judge

Upon consideration of the MOTION TO DISMISS filed by the appellant on 5/7/01,

IT IS ORDERED that this cause is DISMISSED, pursuant to Federal Rule of Appellate Procedure 42 (b).

APPENDIX F

Oral Opinion of the United States District Court for the Northern District of Illinois in *Stearns* v. *Navigant Consulting, Inc.*, Case No. 99 C 7617 (N.D. Ill. May 9, 2001)

THE COURT: Well, all I will say is I agree with all that's been said. I think there are different ways to count the relevant time period. I've seen it counted in various ways by courts who are evaluating this, not the least of which is counting from the point in time that this case was first filed, people have to be on notice of their potential rights to [Tr. 9] intervene.

But certainly in this case, it goes even beyond November of '99 because the Grimes case finally was filed, and then there was an issue as to whether or not it belonged before this Court as a tag-along case or not, and that issue certainly was before the Court as of at least January of this year, where it became clear that the plaintiffs, in a filing that they made with me, made it clear that they had an objection to a conditional order of reassignment that I had entered in error when I thought that this was another case similar to various others that tagged along and were part of the class.

Once I realized that, we quickly undid the clerical order and made it plain that the Grimes case would stand alone and would proceed in front of I believe it's Judge Bucklo and that any rights that Grimes would have here would be totally dependent on intervention.

And I think the Seventh Circuit has made it plain that if you are planning to appeal any ruling, and you never know how the rulings are going to go, you need

to intervene at the earliest opportunity in order to take an appeal at some point.

And in this instance, I'm aided by the Seventh Circuit's very latest views on this because Judge Ripple issued an opinion on April 27th, just the other day almost, in a case called Vollmer, it's V O L L M E R, where the denial of an intervention in a class action case was upheld.

[Tr. 10] And in that case, the intervenors, the way I read this opinion from Justice Ripple, had attempted to intervene even before the class settlement was ever approved and certainly even during the final approval had attempted to intervene again and that was denied, and part of the reason the intervention denial was upheld on appeal was because of the Court of Appeals' decision to uphold the district court's conclusion that the intervention was untimely, that there had been undue delay, and there was prejudice.

When I look at that case that just came down from the Seventh Circuit which I have to believe represents their latest view, in view of this case, this is as untimely as it gets. When you know of a proceeding, you're involved in a proceeding, you are allowed to make objections throughout the proceeding and never having intervened, even though others, Genesis, for example, intervened in this case. So the litigants had to be aware that intervention was a way to have formal standing in case the objections were not successful. You can't just count on the fact that your objections are going to carry the day.

Now, aside from the delay, I also find that there would be undue prejudice in this case. I think it's

unfortunate as it is that certain defendants who have a right as parties are going to create some delay in the processing of these claims and getting some money back to the class in this case because that is what this class action has been all about [Tr. 11] from day one. And, nevertheless, those defendants have that right and they have a right to have that reviewed, and that review will occur I hope in an efficient manner.

But to add to that some further delay by someone who should have been aware of their intervention rights, somebody who's represented by competent counsel, and to further complicate the payments in this case I think would just be undue and unjust.

For all these reasons, I'm denying the what's styled as an emergency motion to intervene. Thank you.

APPENDIX G

Excerpt From Minute Order of the United States District Court for the Northern District of Illinois in *In the Matter of: Navigant Consulting, Inc., Securities Litigation*, Case No. 99 C 7617 (N.D. Ill. May 9, 2001)

(N.B.: The original is a printed form containing boxes to be filled in and checked; not suitable for full transcription; all relevant material is here included.)

Name of Assigned Judge or Magistrate Judge:

Ruben Castillo

Case Number: 99 C 7617

Date: 5/9/2001

Case Title:

In Re: Navigant Consulting, Inc. Securities Litigation

Emergency motion to intervene of class members Charles L. Grimes and Gordon W. Chaplin, Trustees under the will of Louise C. Chaplin, Charles L. Grimes and Gordon W. Chaplin, Trustees Under the Louise D. Catherwood Trust and Gordon W. Chaplin, Individual Trustee of the Jessica D. Catherwood Trust is denied for the reasons stated in open court.

Date docketed: May 10 2001

APPENDIX H

Statutes and Rules of Court Involved in the Case

Appendix H1

Federal Rules of Appellate Procedure — Excerpts From Rule 3

Rule 3. Appeal as of Right — How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

* * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

* * *

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it

names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

* * *

Appendix H2

Federal Rules of Civil Procedure, Rule 23(e)

(e) A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Appendix H3

Federal Rules of Civil Procedure, Rule 24

Rule 24. Intervention

(a) Intervention of Right.

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention.

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure.

A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or

any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

Appendix H4

Relevant Portions of the Private Securities Litigation Reform Act of 1995 ("PSLRA") dealing with class notice, 15 U.S.C. § 78u-4(a)(7)

(7) Disclosure of settlement terms to class members

Any proposed or final settlement agreement that is published or otherwise disseminated to the class shall include each of the following statements, along with a cover page summarizing the information contained in such statements:

(A) Statement of plaintiff recovery

The amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis.

(B) Statement of potential outcome of case

(i) Agreement on amount of damages

If the settling parties agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this chapter, a statement

concerning the average amount of such potential damages per share.

(ii) Disagreement on amount of damages

If the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this chapter, a statement from each settling party concerning the issue or issues on which the parties disagree.

(iii) Inadmissibility for certain purposes

A statement made in accordance with clause (i) or (ii) concerning the amount of damages shall not be admissible in any Federal or State judicial action or administrative proceeding, other than an action or proceeding arising out of 7such statement.

(C) Statement of attorneys' fees or costs sought

If any of the settling parties or their counsel intend to apply to the court for an award of attorneys' fees or costs from any fund established as part of the settlement, a statement indicating which parties or counsel intend to make such an application, the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought. Such information shall be clearly summarized on the cover page of any notice to a

party of any proposed or final settlement agreement.

(D) Identification of lawyers' representatives

The name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions from class members concerning any matter contained in any notice of settlement published or otherwise disseminated to the class.

(E) Reasons for settlement

A brief statement explaining the reasons why the parties are proposing the settlement.

(F) Other information

Such other information as may be required by the court.

Supreme Court, U.S.
FILED
APR 25 2002
OFFICE OF THE CLERK

(2)

No. 01-1297

IN THE

Supreme Court of the United States

CHARLES L. GRIMES AND GORDON W. CHAPLIN, TRUSTEES UNDER THE WILL OF LOUISE C. CHAPLIN; CHARLES L. GRIMES AND GORDON W. CHAPLIN, TRUSTEES UNDER THE LOUISE D. CATHERWOOD TRUST; AND GORDON W. CHAPLIN, INDIVIDUAL TRUSTEE OF THE JESSICA D. CATHERWOOD TRUST,

Petitioners,

v.

NAVIGANT CONSULTING, INC.; POLICEMEN AND FIREMEN RETIREMENT SYSTEM OF THE CITY OF DETROIT; *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PLAINTIFF CLASS

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STATEMENT

Petitioners are objectors to a securities class action settlement that was approved by the trial court over their objections. The claims in the class action stem from Navigant Consulting, Inc.'s ("Navigant") improper use of the pooling of interests method of accounting to account for four companies it acquired during the first quarter of 1999. As a result of that improper accounting, Navigant reported earnings that were wrongfully inflated. Investors were alerted to the alleged improprieties before the stock market opened on November 22, 1999, when Navigant publicly disclosed that its accountants had questioned the Company's use of the pooling method and that it might have to restate its prior financial statements. The market's reaction to this disclosure was swift and dramatic. Navigant's common stock dropped 45% on November 22, falling from $26.00 to $14.25 per share. Pet. App. 4a. Subsequently, on January 24, 2000, Navigant confirmed that it had restated its financial statements for the first three quarters of 1999. After the January 24, 2000, disclosure, the price of Navigant common stock rose 13.8%, from $9.9375 to $11.5125. *See* Lead Plaintiff's Reply Memorandum in Support of Final Approval of Settlement, Plan of Distribution and Attorney's Fees, at 8.

The class action settlement resolved the claims of all those who purchased Navigant securities during a class period from January 1, 1999, through and including November 19, 1999 (the last trading day prior to Navigant's disclosure). The settlement provided that in exchange for $23 million in cash (plus 50% of any recovery obtained by Navigant as a result of its litigation with one of its insurance carriers), class members released all claims for damages arising from statements defendants made during the class period, including any damages

with respect to purchases of Navigant stock after the class period based on these class-period statements that Plaintiffs challenged as being false and misleading. *See* Stipulation of Settlement (Sept. 22, 2001), at 8-9.

Petitioner Charles L. Grimes ("Grimes") represents certain trusts (the "Trusts") that allegedly purchased Navigant stock in both November and December 1999.[1] No later than August 2000, Grimes was informed that the class period would conclude on November 19, 1999, and that there would be no recovery in this case with respect to purchases of Navigant securities after that date.[2] Pet. App. 4a. Grimes did

1. Grimes, a lawyer, is a serial plaintiff who has filed no fewer than eight cases, all of which were ultimately dismissed. *See, e.g., Grimes v. Wetzler*, 749 A.2d 535 (Pa. Super. Ct. 2000) (suing New York Tax Commissioner for constitutional violations); *appeal denied*, 766 A.2d 1249 (Pa.), *and cert. denied*, 533 U.S. 924 (2001); *Grimes v. Northwest Airlines, Inc.*, No. Civ. A. 98-CV-4794, 1999 WL 562244 (E.D. Pa., Jul. 30, 1999) (suing for damages relating to injuries he allegedly sustained after being arrested on an airplane for disorderly conduct); *Grimes v. Camilli*, 238 A.D.2d 289 (N.Y. App. Div. 1st Dept. 1997) (action to recover legal fee notwithstanding Grimes' admission that "he was never the counsel of record and never took part in any court proceeding related to the probate matter in which defendant was involved, did not prepare any documents in their final form, did not maintain any time records and did not conduct depositions"). This Petition for Certiorari is Grimes' fifth attempt to seek this Court's review. His four prior petitions were denied. *See Grimes v. Wetzler*, 533 U.S. 924 (2001); *Grimes v. Northwest Airlines, Inc.*, 531 U.S. 879 (2000); *Grimes v. Vitalink Comm. Corp.*, 525 U.S. 867 (1998); *Grimes v. John P. McCarthy Profit Sharing Plan*, 506 U.S. 861 (1992).

2. Separately, in his personal capacity, Grimes claims to be the largest individual holder of Navigant common stock, but he purchased (Cont'd)

not then seek to intervene on behalf of the Trusts. Instead, in September 2000, after the settlement of this case was announced, Grimes filed his own separate class action against Navigant. That action, *Grimes v. Navigant Consulting, Inc.*, No. 00 C 7609 (N.D. Ill.), is based on identical misrepresentations but alleged a class period that extended through January 24, 2000, to provide a recovery for purchases of Navigant securities after November 19, 1999. Grimes unsuccessfully sought to have *Grimes v. Navigant* consolidated with this case, and the case was assigned to a different judge (Honorable Elaine Bucklo). Rather than having the Trusts opt out of this class action to pursue their claims in *Grimes v. Navigant*, Grimes chose to keep the Trusts as class members and object to the settlement. *See* Objection to Approval of Settlement by Charles L. Grimes and Gordon W. Chaplin ("Objection"), at 11-12.[3] Despite many

(Cont'd)

none of his shares during the class period; he purchased 513,000 shares between November 26, 1999, and January 24, 2000. *See* Certification of Charles L. Grimes to Complaint in *Grimes v. Navigant Consulting, Inc.*, No. 00 C 7609 (N.D. Ill.).

3. Unlike most objectors to class action settlements, Grimes did not challenge the amount of the settlement. On the contrary, he thought the recovery it provided was so good that he wanted class members to share it with non-class members: post-November 19 purchasers, including himself. *See* Objection at 11-12. Grimes also objected to one aspect of the Notice of Class Action Settlement, regarding disclosure of counsel fees. Because the precise amount of the portion of the settlement related to the pending litigation with Navigant's insurer was not known when the Notice was sent, the Notice stated that counsel would seek 20% of the Settlement Fund. The District Court found that the Notice adequately informed the class that attorneys' fees would be calculated on the total Settlement Fund, including both the fixed and as-of-yet undetermined portions. Tr. of Proceedings, Mar. 22, 2001. Notably, Grimes did not object to the fee percentage sought by class counsel.

opportunities (*see* Pet. App. 4a-5a, 13a-14a), Grimes did not seek to intervene the Trusts as parties to the action while the case was pending in the District Court.

After the Trusts' objection was denied and the settlement was approved by the District Court, Grimes filed a Notice of Appeal to the Seventh Circuit. However, that appeal was voluntarily dismissed after the Seventh Circuit questioned Petitioners' standing due to their failure to intervene. Pet. App. 10a, 12a. Only then did Grimes move on behalf of the Trusts to intervene as a party. The District Court denied Petitioners' motion to intervene, finding it "as untimely as it gets," because Petitioners did not move until nearly nine months after their disagreement with certain terms of the settlement became clear and nearly two months after their objections had been overruled. Pet. App. 14a. The Seventh Circuit affirmed. Pet. App. 7a. The Seventh Circuit also dismissed Petitioners' conditional appeal from the trial court's order approving the class action settlement, due to lack of jurisdiction, citing *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998), affirmed by an equally divided court under the name *California Public Employees' Retirement System v. Felzen*, 525 U.S. 315 (1999). Pet. App. 7a.

Since the Seventh Circuit's decision, Judge Bucklo has dismissed *Grimes v. Navigant Consulting, Inc.* in its entirety for failure to state a claim. 185 F. Supp. 2d 906 (N.D. Ill. 2002). Thus, the very claims that Grimes contends should have been included in the resolution of this case have been found meritless as a matter of law.

ARGUMENT

THE PETITION FOR CERTIORARI SHOULD BE DENIED

There is no reason to grant certiorari in this case. As Petitioners concede, the issue presented by the petition is the same issue now before the Court in *Devlin v. Scardelletti* (No. 01-417), in which this Court heard argument on March 26, 2002. Pet. 9. This Court routinely holds or defers consideration of petitions for certiorari pending the outcome of another case that raises the same issues for which review is sought. *See, e.g., Stutson v. United States*, 516 U.S. 163 (1996) (Scalia, J. dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted"); *Winfield v. Kaplan*, 512 U.S. 1253 (1994) (Scalia, J. dissenting) (noting that disposition on petition for certiorari was deferred pending announcement of judgment in a case that presented similar issues).[4] In this case, however, certiorari should be denied immediately because Petitioners cannot prevail no matter how this Court rules in *Devlin*.

I. If This Court In *Devlin* Requires Intervention To Preserve Appeal Rights, The Seventh Circuit's Decision Would Stand.

Should this Court rule in *Devlin* that party status is necessary to appeal the denial of objections to a settlement, the Seventh Circuit's decision would stand and certiorari should be denied.

4. The fact that Grimes formulated a second question in his petition -- if intervention is required, should it be *pro forma*? (Pet. 10) — does not make this case any more worthy of certiorari, since Grimes already presented that very argument to the Court as an *amicus* in *Devlin*. *See* No. 01-417, Brief of Charles L. Grimes, *et al.* as *Amici Curiae* in Support of Petitioner, at 24-25.

II. Even If This Court In *Devlin* Holds Intervention Is Not Necessary To Preserve Appeal Rights, The Petition For Certiorari Should Be Denied Because Petitioners' Argument In Support Of Their Objection To The Settlement Is Precluded By *Res Judicata.*

In their Statement of the Case, Petitioners failed to disclose two key facts: (1) Grimes has instituted a separate class action in which he sought to recover on the very same claims Petitioners contend were improperly excluded by the settlement here; and (2) that action was dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. *Grimes v. Navigant*, 185 F. Supp. 2d 906. Therefore, the Petition should be denied because the post-November 19 claims that Petitioners contend were improperly excluded from the settlement are precluded by *res judicata*.

Petitioners objected to the settlement because it released all claims of class members arising from alleged misrepresentations made during the class period. Petitioners contended that it was unjust to release any such claims relating to post-class period purchases allegedly made in reliance upon misrepresentations made during the class period because the settlement did not provide a recovery for those purchases.[5] *See* Objection at 8. The premise of Grimes'

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5. Importantly, this was a Rule 23(b)(3) class with full opt out rights. At the point when class members had to decide whether to opt out of the class, they knew the value of the settlement. Thus, each class member, including the Trusts, was able to evaluate whether the consideration being offered was adequate to warrant the release of all claims based on statements made during the class period, which was required to participate in the settlement.

objection is that these claims, based on the impact of class period statements on post-class-period purchases, have value. However, in *Grimes v. Navigant*, the court held as matter of law that those very claims have no value.

In *Grimes v. Navigant*, Petitioner Grimes, individually and on behalf of a class of persons who purchased Navigant stock from May 6, 1999, through January 24, 2000, asserted 10b-5 claims identical to those asserted in this class action — that the accounting for Navigant's first quarter acquisitions was improper — but with a different class period. 185 F. Supp. 2d at 908-09. *Grimes v. Navigant* alleged that the misrepresentations concerning the pooling method of accounting were not corrected until the Company announced the restatement of its financial statements on January 24, 2000. The District Court dismissed that action in its entirety, holding that shareholders could not recover for purchases of stock made after the November 22 disclosures.[6] Because the price of Navigant stock actually rose on January 24, 2000 (Grimes' purported cure date), the court held that any misrepresentations not cured by the November 22 disclosures, as a matter of law, were not material. *Id.* at 914.

The court's dismissal of *Grimes v. Navigant* pursuant to Rule 12(b)(6) "constitutes a final adjudication on the merits" for *res judicata* purposes. *Wade v. Hopper*, 993 F.2d 1246, 1252 (7th Cir. 1993). *See also Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) ("The dismissal for failure to state a claim under Federal Rule of Civil Procedure

6. The court dismissed claims asserted for pre-November 22 misrepresentations because Grimes purchased his shares on November 26, 1999, and as a matter of law he could not recover for frauds disclosed before he bought his stock. *Grimes v. Navigant*, 185 F. Supp. 2d at 912.

12(b)(6) is a 'judgment on the merits'" with full *res judicata* effect). That Grimes has appealed the dismissal of his claims does not deprive the judgment of its res judicata effect. *Deposit Bank of Frankfort v. Board of Councilmen of Frankfort*, 191 U.S. 499 (1903) (original state court judgment entitled to *res judicata* effect in subsequent federal action so long as state case remained pending without decision on appeal); *Smith v. SEC*, 129 F.3d 356, 362 n.7 (6th Cir. 1997) (pending appeal of judgment does not deprive the judgment of *res judicata* effect).

Thus, even if Grimes (on behalf of the Trusts) could appeal the denial of his objection, such an appeal would be futile: the issue of whether there can be a recovery for purchases of Navigant securities after November 19, 1999, based on statements made before that date has been determined and is *res judicata*. Accordingly, the issue underlying Grimes' objection has been resolved against him in his subsequent action.

III. If This Court in *Devlin* Requires Intervention To Preserve Appeal Rights And Holds It Must Be Granted Liberally, the Petition For Certiorari Should Be Denied Because Petitioners' Motion to Intervene Failed Under The Most Liberal Standard.

The Seventh Circuit liberally grants class members' motions to intervene to preserve appeal rights. *See In re Synthroid Marketing Litig.*, 264 F.3d 712, 715 (7th Cir. 2001); *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 881 (7th Cir. 2000). Though it applied that standard in this case, Pet. App. 3a, the intervention motion did not succeed, given Grimes' lengthy and prejudicial delay. Thus, even if the Court were inclined in *Devlin* to liberalize the granting of intervention motions by objecting class members solely to preserve appeal rights, certiorari still should be denied in this case.

In affirming the District Court, the Seventh Circuit noted "that intervention should be freely allowed, if limited to the purpose of taking an appeal. But this attitude cannot abolish the requirement in Rule 24 that intervention be timely." Pet. App. 3a. In light of this liberal allowance of intervention, and applying the timeliness standard derived from this Court's decision in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977),[7] the Seventh Circuit concluded that the District Court properly exercised its discretion as gatekeeper in denying the motion to intervene. Nearly nine months before moving to intervene, Petitioners knew that the settlement provided no recovery for post-class period purchasers yet waited without justification to seek intervention until final judgment had been entered and their first attempt to appeal had been questioned. Pet. App. 4a-5a. Indeed, Petitioners did not lose on the motion to intervene simply because it was made post-judgment. While noting that it is "hard to see how a post-judgment motion could be timely," the Seventh Circuit stated "'hard' differs from 'impossible'" and cited *United*

7. The rulings below are wholly consistent with this Court's holding in *United Airlines*. In *United Airlines*, this Court held that a putative class member's motion to intervene for the purpose of appealing the District Court's denial of class certification should have been granted as timely when that motion was made as soon as it was clear that the named plaintiffs would not appeal that denial, which did not become apparent until after judgment. Notably, the standard this Court applied is the very standard applied below: intervention is required "as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives." 432 U.S. at 394. Far from the blanket approval of post-judgment intervention motions that Petitioners erroneously characterize it to be, *United Airlines* is further support for the need of unnamed class members to move timely for intervention to preserve appeal rights once they conclude that the class representative will not protect their interests.

Airlines as an example of a circumstance where post-judgment intervention motions are properly allowed. Pet. App. 2a. The plain fact is that Grimes knew his claims were not being represented in this case at least seven months before judgment and did not seek to intervene.

This case illustrates the prejudice that can occur when there is no gatekeeper to screen out persons who lack *bona fides*. Although Rule 24(a) sets a liberal standard for intervention by a class member, it requires the trial court to screen out those who fail to satisfy the requirements of the rule, including the plain requirement to make a timely motion. *See Vollmer v. Publishers Clearing House*, 248 F.3d 698, 705 (7th Cir. 2001). As the Seventh Circuit noted, Petitioners' failure to intervene timely prejudiced the Respondents by depriving them of the opportunity to develop a factual record concerning the circumstances surrounding Petitioners' stock purchases and whether the objection was being pursued in good faith. Pet. App. 7a. Grimes claims to be the largest individual shareholder of Navigant but he is not a class member. *See* Affidavit of Charles L. Grimes (Feb. 23, 2001) at ¶¶ 6, 8. In August 2000 (seven months before the settlement approval hearing), Grimes learned of the settlement and expressed to Lead Counsel his intention to object on his own behalf, only to be told that, as a non-class member, he lacked standing. *See* Lead Plaintiff's Position on Reassignment of the Grimes Action, at ¶ 6. Even though Grimes could have excluded the Trusts from the class and preserved all of the claims he contended had value, he chose not to opt out and instead filed objections on the Trusts' behalf which, if successful, would have had the effect of benefitting himself personally far more than the Trusts for which he is a fiduciary. Had the Trusts timely moved to intervene, they would have subjected Grimes to discovery concerning the true party in

interest behind the objection and whether Grimes was elevating his personal interests over those of the Trusts. By failing to seek intervention, as the Seventh Circuit observed, "these objectors hobbled that inquiry." Pet. App. 7a. Given that intervention requirements under Rule 24(a) are easily met by class members with legitimate objections, there was no justification for sidestepping the Rule's gatekeeping function in this case.

Thus, even under the very liberal standards the Seventh Circuit has formulated for class member intervention under Rule 24(a), Petitioners' motion was properly denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 01-1297

Supreme Court, U.S.
FILED
MAY 8 2002

IN THE

Supreme Court of the United States

CHARLES L. GRIMES AND GORDON W. CHAPLIN, TRUSTEES UNDER THE WILL OF LOUISE C. CHAPLIN; CHARLES L. GRIMES AND GORDON W. CHAPLIN, TRUSTEES UNDER THE LOUISE D. CATHERWOOD TRUST; AND GORDON W. CHAPLIN, INDIVIDUAL TRUSTEE OF THE JESSICA D. CATHERWOOD TRUST,

Petitioners,

v.

NAVIGANT CONSULTING, INC.; POLICEMEN AND FIREMEN RETIREMENT SYSTEM OF THE CITY OF DETROIT; *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The brief in opposition[1] suggests that "[t]here is no reason to grant certiorari in this case," notwithstanding the pendency before this Court of the identical issue in *Devlin* v. *Scardelletti*, No. 01-417 (Br. in Opp. at 5),[2] because all the issues raised by petitioners have allegedly been decided against them in another case and hence petitioners will be barred below by *res judicata* when the case is remanded. But the brief's characterization of the issues raised in the courts below is not correct. Even if it were, *res judicata* would neither end this case nor render grant of certiorari inappropriate.[3]

Res Judicata Is Inapplicable To Petitioners' Claims Below.

The central argument of the brief in opposition is that all the issues on which petitioners' objections to

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[1] The brief in opposition purports to be filed on behalf of "Respondent Plaintiff Class." But the relevant respondent is Policemen and Firemen Retirement System of the City of Detroit, the appointed representative of the plaintiff class.

[2] The brief also suggests that the second issue raised by the Petition–if intervention by class members who are not named parties is necessary in order to appeal, should the requirement be more onerous than a *pro forma* post-judgment intervention pursuant to an unconditional right to intervene–does not make this case more worthy of certiorari "since [Petitioners] already presented that very argument to the Court as an *amicus* in *Devlin*" (Br. in Opp. at 5 n.4). This reasoning is misplaced, because this Court may never reach that issue in *Devlin*, either because a decision is made on other grounds or because this Court determines that this second issue was not properly raised by the petitioner in *Devlin*.

[3] Consistent with Rule 15.6, we here address only the new points raised in the brief in opposition–its Argument II. Its other substantive argument–Argument III–is covered completely in the Petition.

the settlement were based have been decided in a different suit, *viz.*, an action filed as an individual shareholder by Charles L. Grimes, who is one of the trustees who are petitioners here (the "Grimes Action"). Thus, the argument runs, even if this action is remanded to the courts below, petitioners would be barred by *res judicata*, so that grant of certiorari here would be pointless. (Br. in Opp. at 6-8).

This argument is wrong for two reasons. First, one of the two key issues raised by petitioners' objection to the settlement here was neither raised nor decided in the Grimes Action, nor could it have been.[4] Second, the parties in this action and the Grimes Action are neither the same nor in privity with one another.

A. A major issue asserted in this action was neither raised nor decided in the Grimes Action, nor could it have been.

The brief in opposition ignores that petitioners objected to the settlement of this class action on not one but *two* grounds. One of these grounds–that the settlement notice did not meet the requirements of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), in that the fees sought by lead counsel were greater than that set out in the settlement notice to the stockholder class (Pet. at 5)—obviously could not have been raised in the Grimes Action (which nowhere

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[4] The brief in opposition wrongly accuses petitioners of failing to disclose the existence of the Grimes Action (Br. in Opp. at 6). To the contrary, this is fully revealed in the Petition (Pet. at 3-4). On the other hand, the brief in opposition incorrectly repeats the misstatement by the Seventh Circuit that Mr. Grimes sought to consolidate the Grimes Action with this matter (*Compare* Br. in Opp. at 3 *with* Pet. at 4 n.3).

concerned the conduct of lead counsel in this case below); it was not there raised or decided, nor could it have been. For this reason alone, *res judicata* cannot apply to this ground for objection and thus offers no basis on which to deny the Petition. *See, e.g., Roboserve, Inc.* v. *Kato Kagaku Co.*, 121 F.3d 1027, 1034 (7th Cir. 1997) (noting that for *res judicata* to apply all three criteria "'must be met'"—identity of the cause of action, identity of the parties or their privies, and final judgment on the merits) (citation omitted).

B. The parties in this action and the Grimes Action are neither the same, nor in privity with one another.

The argument also ignores that Mr. Grimes, although involved in both this case and the Grimes Action, does so in different capacities: here, as a co-trustee of certain trusts; in the Grimes Action, in his individual capacity as a shareholder.[5] It is well established that a "party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in

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[5] As the brief in opposition notes, the Grimes Action was dismissed by the United States District Court for the Northern District of Illinois before deciding whether it should be treated as a class action (Br. in Opp. at 4). That dismissal has been appealed to the United States Court of Appeals for the Seventh Circuit, No. 02-1569.

another capacity." RESTATEMENT (SECOND) OF JUDGMENTS § 36(2) (1980);[6] *see also, e.g., Warnock* v. *Pecos County*, 116 F.3d 776, 778 (5th Cir. 1997) (citing Restatement); *Roy* v. *City of Augusta*, 712 F.2d 1517, 1522 (1st Cir. 1983) (applying Maine law and holding that action not barred by *res judicata* because it brought against individual in a different capacity as prior action); *Jones* v. *Texas Tech Univ.*, 656 F.2d 1137, 1143 (5th Cir. 1981) (referring to the "general 'rule of differing capacities'"); *Hamilton Group, Inc.* v. *Welch*, C.A. No. 3:96-CV-2950, 1997 WL 560775, at *2 (N.D. Tex. Sept. 2, 1997) (holding res judicata inapplicable to claim asserted against defendant in representative capacity where defendant had, in prior suit, been plaintiff in individual capacity); *Resolution Trust Corp.* v. *Farmer*, 836 F. Supp. 1123, 1132 (E.D. Pa. 1993) (citing Restatement); *Hudgins* v. *Davidson*, 127 B.R. 6, 8 (E.D. Va. 1991) (referring to the "capacities rule"); *Capone* v. *Globe Air, Inc.*, 625 F. Supp. 1566, 1568 (D. Maine 1986).

This rule of different capacities has been applied to determine that *res judicata* does not bar a trustee from later pursuing an action in an individual capacity. *See, e.g., Hurt* v. *Pullman Inc.*, 764 F.2d 1443, 1448 (11th Cir. 1985) (citing Restatement, and noting that

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[6] One scenario in the comment to the Restatement (Second) of Judgments reflects the precise difference between actions by Mr. Grimes individually, and actions by him as a trustee:

> A, as trustee for his children brings an action to quiet title in Blackacre against B. The judgment, whether for A or B, does not preclude A from bringing an action to enforce a claim to Blackacre on his own behalf.

RESTATEMENT (SECOND) OF JUDGMENTS § 36 cmt. b, illus.1.

the "case law has applied this principle in numerous cases in which a party appears in one suit as a fiduciary or trustee, and in another suit in an individual capacity"); *see also McIntosh* v. *Johnson*, 649 So.2d 190, 193-94 (Miss. 1995), *overruled on other grounds*, *Norman* v. *Bucklew*, 684 So.2d 1246 (Miss. 1996) (referring to the Restatement, and holding that a church trustee representing the church in a land dispute was not barred from later bringing a suit individually based on the same disputed land).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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